

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL

77-4046

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE FLORSHEIM SHOE STORE COMPANY OF PITTSBURGH,
PENNSYLVANIA AND THE FLORSHEIM SHOE STORE COM-
PANY OF MONROEVILLE, PENNSYLVANIA,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND TO SET ASIDE AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

PETITIONERS' BRIEF

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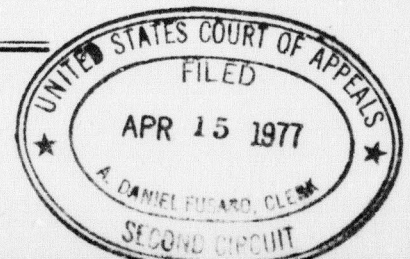


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PETITIONERS' BRIEF

Issues Presented for Review

1. Does a company's change in its sales force from predominantly part time to all full time employees (which involves the termination of employment for part time salesmen unable to work full time) violate §8(a)(3) of the Labor Management Relations Act when it is uncontradicted that the change in the sales force was planned for valid business reasons - and steps were taken to implement that plan - before any union organizational acti-

vity, simply because the change occurred after a union had filed a petition with the National Labor Relations Board [the "Board"] seeking to represent the company's employees? Even assuming such a change does violate §8(a)(3), may the Board properly order the company to reinstate the former part time employees to part time positions when it is undisputed that the company has changed its operations and does not now have - and for over a year has not had - any part time positions?

2. Is it not arbitrary, capricious and an abuse of its discretion for the Board to order a company to bargain with a union, where no election to select a bargaining representative has been held among employees, because of terminations which were, in fact, lawful and on the basis of authorization cards obtained from those persons whose employment was lawfully terminated before those persons would have been eligible to vote?

3. Whether the Board's conclusion that Petitioners committed certain unfair labor practices is supported by substantial evidence on the record as a whole?

Statement of the Case

Nature of the Case

On this appeal, the Florsheim Shoe Store Company of Pittsburgh, Pennsylvania and the Florsheim Shoe Store Company of Monroeville, Pennsylvania [the "Company"] petition for review and to set aside, and the National Labor Relations Board seeks enforcement of, a decision and order of the Board concluding that the Company had engaged in certain unfair labor practices and directing it to bargain with Retail Store Employees Union, Local 1407 [the "Union"].

The principal issue to be decided in this case is whether - as the Board concluded - the company violated §8(a)(3) of the Labor Management Relations Act, 29 U.S.C. §158(a)(3) [the "Act"] by changing its sales force from predominantly part time to all full time employees, simply because the change was made after the union had filed a petition with the Board seeking to represent company employees. The uncontradicted evidence proves that this change in sales force was made for valid business reasons, that it was planned well before the company ever knew of any union organizational activity, and that the change was underway prior to the union's filing its petition. No anti union motivation existed or has been proved. The termination of part time employees who could not work full time was therefore, we contend, perfectly lawful.

The Board issued a bargaining order in this case, premised on its finding that the termination of part time employees pursuant to the sales force change was unlawful. If, contrary to this determination, the part time employees were lawfully terminated, then the bargaining order must be set aside. The union never had authorization cards from a majority of the full time employees. The basis of the Board's order was the finding of unlawful terminations. Because the terminations were lawful, there is no other basis for the Board's bargaining order.

In addition, the Company challenged the Board's conclusion that it committed other unfair labor practices. The General Counsel did not sustain his burden of proof on these allegations.

Mindful of the review requirements of Universal Camera,* however, the Company will not contest certain other Board findings that low level company supervisors violated §8(a)(1) of the Act. Although the Company views these matters differently from the Board, a lawyer like appraisal of the record leads one to conclude that there is probably sufficient record evidence to sustain those determinations, under Universal Camera.

* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

The Board Proceedings

Following hearings held before Senior Administrative Law Judge Nachman* on March 3, 4, 23 and 24, 1976, brought about by charges of unfair labor practices filed by the union, the ALJ issued his decision on September 27, 1976. He found that the company had committed certain unfair labor practices and recommended inter alia that a bargaining order issue, on the basis of a union "majority" built on authorization cards obtained from the lawfully terminated part time employees. Even though it is not contested that the company no longer has part time positions, he nonetheless also recommended that the terminated part time employees be reinstated to part time positions.

After the company filed exceptions to the ALJ's decision, the Board summarily - without written opinion - affirmed the ALJ and adopted his recommended order, in a Decision and Order dated January 17, 1977. 227 NLRB #166 (1977).

The company filed its Petition for Review in this Court on February 15, 1977. The Board filed its Cross-Appliation for Enforcement on March 11, 1977.

* The Senior Administrative Law Judge is referred to throughout as ALJ.

Statement of Facts

The petitioners, owners of five retail stores in the Pittsburgh area selling shoes and related footwear accessories, are subsidiaries of the Florsheim Shoe Shops, Chicago, Illinois. The Florsheim Shoe Shops is the national, "umbrella" company for Florsheim shoe stores, and it is directly responsible for labor relations in all Florsheim stores throughout the country.

Declining Sales in the Pittsburgh Stores

As in all national companies, regional performance is reviewed by Florsheim on a periodic basis. About the beginning of 1975, Florsheim became concerned about the Pittsburgh stores. (Joint Appendix, pages 530-533a; 533-535a; 639-41a; 686-88a; hereafter "A.____").

Pittsburgh's sales and profitability were down. Compared to Florsheim's nationwide experience in 1974, Pittsburgh's 1974 performance was poor. (Respondents' Exhibit 9, A. 911a). Judged against year - earlier figures, Pittsburgh area sales were dropping precipitously. (Respondents' Exhibits 11(a), 11(b), A. 921a-922a). All this discouraging news came at the very same time the nation was generally recovering from the recession.

Indeed, the experience in Pittsburgh was judged to be way out of line, because at the same time Florsheim as a whole was experiencing significant growth in sales. Sales nationwide were up almost 9% while Pittsburgh remained static. (A. 537a; A. 639a; A. 686-8a; Respondents' Exhibits 9, A. 911a; 11a, A. 921a; 11b, A. 922a).

Florsheim's management therefore decided to investigate the problems in Pittsburgh. Stock, merchandising, store locations and composition of the sales force were all reviewed. Based on this investigation, Florsheim determined in January 1975 that the Pittsburgh problem resulted from employing an extraordinarily large number of part time salesmen, 12 out of a total sales force of 22. (A. 535-537a).

Florsheim's prior experience had taught that a sales force composed predominantly of part time salesmen, as was Pittsburgh, invariably cuts into profitability and results in declining sales volume. Part time employees are generally not as familiar with stock or selling methods as full time salesmen. They also tend to work during peak sales times - Thursday nights and Saturdays - where their lack of familiarity can cut deeply into anticipated and necessary sales figures. (A. 563a; A. 564-6a).

These judgements were based on Florsheim's having experienced the same set of symptoms, before, in other areas of the country. Florsheim previously had eliminated part time help in Los Angeles, Philadelphia, New York and Atlanta. (Id.). Each time, when Florsheim attempted the cure of eliminating or substantially reducing part time help, the stores' performance always improved. (Id.).

The Pittsburgh District Manager

Because Florsheim is a nationwide company, it operates through layers of management. The overall responsibility for over 300 Florsheim stores nationwide is vested in General Manager Louis Brien and his staff. Reporting to the General Manager are Area Managers who are responsible for stores in several states. Ted Silverhorn was the area manager involved in this case. City metropolitan areas are under the supervision of a District Manager. He is directly responsible for the staffing of stores in the area. He is subject to orders from Chicago, but has some discretion - based, for example, on availability of full time help - in when and how to implement those orders.

In Pittsburgh, the District Manager is Howard Levine. He is the nephew of Harold Florsheim, the founder and a principal of Florsheim. (A. 653a). Given the discretion accorded District Managers, as well as his unique per-

sonal situation, Levine was in the position in Pittsburgh of being able to avoid carrying out orders from Chicago, until significant pressure was brought to bear.

The Plan to Change to Full Time Help

In December 1974 or January 1975 after its review of Pittsburgh problems, Florsheim management determined that it had to change the composition of the Pittsburgh sales force, to all full time help.

The testimony on this point is uncontradicted and corroborated by three witnesses who were all involved in the decision making process: Lou Brien, general manager of Florsheim; Paul Holmes, Brien's administrative assistant; and Ted Silverhorn, Levine's immediate superior. Indeed, the General Counsel offered no evidence on this point at all.

Brien testified:

"This was in either December of 1974 or January of 1975. At that time, after we had extensive meetings on this, numerous meetings, we decided to change the composition of the sales help and go to full time people." (A. 535-6a; See also A. 639-641a; 643-644a; 686-688a).

Given Florsheim's management structure, this decision flowed through to Silverhorn from Brien and Holmes, in numerous communications. These were either oral or written as notations to Silverhorn on Pittsburgh store payroll registers. (A. 542-558a; Respondents' Exhibits 10(a)-10(i), A. 912a ff).

Silverhorn's testimony demonstrated that he knew precisely what those instructions meant. Responding to the ALJ's inquiry what he deemed it necessary to do to carry out this order, Silverhorn stated:

"To eliminate part time help.

ALJ: Entirely?

Silverhorn: Correct"*

(A. 644a).

But, these instructions were not carried out at the local level. Levine - in his special position - did receive the order from Silverhorn to eliminate part time help. He testified, however:

"I frankly avoided it." (A. 737a).

There matters stood, with Levine failing or refusing to implement Florsheim's plan. Through April, 1975 Brien received reports that Levine was dragging his feet on the plan. Each time he sent back instructions, through appropriate management channels, to make the change to full time employees. (A. 559a, 648a.) However, these instructions fell on Levine's deaf ears**; and it became apparent

* The part time help in the Pittsburgh stores were either students or had other regular full time jobs. In such circumstances, it was plain that replacements, who could work full time, would be necessary.

** Levine did not agree with the appraisal that the Pittsburgh staff's composition was a problem. (A. 737a). After all, he had staffed the stores. He also felt there were no full time salesmen available and thus the change could not be made (A. 651a).

that Brien and his authority might be personally necessary to deal with the situation.

Before Brien could himself turn to the Pittsburgh situation, however, other pressing matters took his attention. Between April and August, 1975, Brien had to devote himself to labor negotiations for the New York and Philadelphia stores, an economic strike in the New York and Philadelphia stores, and to pressing emergency problems on the West Coast. (A. 560-62a). At the beginning of August, Brien went on vacation.

This account is not contradicted. Although they were extensively cross-examined by the General Counsel, Brien, Holmes, Silverhorn and Levine did not change their recollection of events. Neither did the General Counsel offer any evidence at all to controvert when and how Florsheim formulated its plan to change to all full time sales help.

Moreover, documentary evidence introduced by Florsheim fully substantiates the corroborated testimony of the four Florsheim witnesses. At the hearing, Florsheim submitted into evidence 9 separate Pittsburgh payroll registers, dating back to January, 1975, on which Brien or Holmes had written instructions and reminders to eliminate part time help. (Respondents' Exhibits 10(a) - 10(i),

A. 912a ff; A. 539-56a, A. 621-26a; A. 646-8a; A. 675-83a; A. 688-92a). This evidence of instructions - of the plan to eliminate part time help - is unrefuted.

Implementing the Full Time Sales Help Plan

When Brien returned to his office in mid-August, from vacation, he checked his calendar and found he had written a memo to himself to follow up on the Pittsburgh situation. (A. 562a). Silverhorn reported that nothing had been done to eliminate part time help in Pittsburgh. (A. 562a; A. 650a).

Hearing this, and now with the time to devote to Pittsburgh personally, Brien took charge of the situation. (A. 563a; A. 651a). He testified:

"It was at that time [in the middle of August] I told Mr. Silverhorn [that] he and Mr. Levine should forget about it, that I was going to handle it personally and see that it was accomplished as quickly as possible."

(A. 563a).

At this point, Brien began to "call the shots" himself, without consultation with Pittsburgh. He was "personally" in charge, and became the sole decision maker on when and how the plan would be implemented.

This decision to take charge was made during the week of August 18; immediately Brien set the change in

motion by having inquiries made among Florsheim stores in other areas to find out if full time sales people were available to transfer to Pittsburgh. (A. 563a; A. 599a; A. 692-5a; on timing of the search for transfers, see, A. 563-7a; A. 587-8a, A. 591-93a, A. 591-5a; A. 649-50a; A. 650-51a; A. 692-93a).*

Thus, this is how matters stood at the end of August, 1975:

- In December, 1974 - January, 1975 Florsheim had determined that Pittsburgh's low profitability and declining sales were due to part time sales help being the predominant part of the sales force
- In December, 1974 - January, 1975, based on prior, similar situations, Florsheim had decided to eliminate part time help in Pittsburgh
- Starting in January, 1975 and continuing through the spring, instructions to make the change to full time help had gone to Levine, the Pittsburgh District Manager
- Levine, a close relative of a high company executive, consistently failed to follow these instructions
- Brien, the chief operating manager, had personally taken over the situation and was actively seeking full time transfers to come to Pittsburgh
- No announcement of the change was made because without replacements available, the stores had to run as efficiently as possible; and the announcement of the impending change would certainly have impaired the part time salesmen's efficiency.

* Levine was on vacation until August 25, but he was notified about Brien's taking charge by Silverhorn, at the beginning of that week. (Id.)

Florsheim Learns of the Union

Before making the final change to all full time help Brien waited to receive word that transfers were available in other Florsheim stores. Thus, no action could be, or was taken by Brien. Then, on September 2 Brien heard for the first time about the Union, and that it had filed a petition with the Board on August 29, 1975. (A. 568a, A. 602-04a, A. 695a, A. 743-4a; A. 782-3a).

Aware that a new factor had been added to the January full time help plan, according to which the search for full time sales people was going forward, Brien communicated with counsel and temporarily suspended attempts to finish the change.

Brien testified that the December, 1974 - January, 1975 decision to change to full time sales help was deferred on September 2:

"JUDGE NACHMAN: All right, now when after that deferral, when did you finally reach the conclusion that the lines are firmly and finally drawn?

THE WITNESS: The only reason for the delay on September 2nd, was that I did want to talk to my Counsel, Mr. Dicker.

JUDGE NACHMAN: All right, now --" (A. 617a)

Significantly, Brien continued:

THE WITNESS: As to what risk had been taken. My decision as to replacing the part-time people was not dropped and then renewed.

JUDGE NACHMAN: All right, but it was suspended at least until after you talked to Mr. Dicker?

THE WITNESS: Yes sir. I had a new factor put in there.

JUDGE NACHMAN: All right, now you discussed it with Mr. Dicker and you sought his advice and you got his advice, and then you still concluded that you were going to terminate the part-time employees?

THE WITNESS: Yes.

JUDGE NACHMAN: Now when did you make that decision?

THE WITNESS: Late in the day of September the 8th."

(A. 617-618a).

(emphasis added)

All during this period of suspended implementation, the search for enough full-time transfers continued. (A. 697-99a; A. 712-15a). Thus, the decision Brien made on September 8 was not one to change plans but to continue with his earlier plans. He continued his efforts, begun prior to learning of the union organizing drive, to get full time help to transfer to Pittsburgh.

Finally, Brien's search in other Florsheim stores for full time help who would transfer to Pittsburgh succeeded. Seven transfers were found. Significantly, and negating even any suspicion of anti union animus behind Florsheim's plan to change to all full time sales help, five of these seven

transfers were then working for Florsheim in areas where employees were already represented by the same international union to which the union in this case belongs. (A. 570-571a).

On September 18 the transfers were gathered in Pittsburgh. The change to all full time help had been announced to the 12 part time employees, and they had been asked if they could work full time at hours acceptable to Florsheim. All 12 could not.* They were told they would, therefore, have to be let go. The full time transfers came to work that day.

As a result of this change, sales increased, over the prior year, by almost 5% for the period September - December, in contrast to a 2% decline from January through August while the part time salesmen were at work. (Respondents' Exhibits 11a, b, A. 921a-922a).

The change to full time help had no impact at all on those employees who, the General Counsel contended, had been the leaders in gathering the authorization cards and had spearheaded organizational activity: Macko, Osselburn, Scott and Koritsky. The change was, thus, just what had been planned since January: a personnel move designed to increase sales and profitability made without any reference

* Part time employee Corrigan supplied Florsheim with a list of hours he could work, but the hours he was available were not useful to the Company. (A. 700-704a).

to union organizational activity. The change resulted in an immediate increase in sales.'

There is no evidence in the record, which refutes this account or establishes an anti-union motivation to the change to all full time help. Indeed, the General Counsel offered no evidence at all to rebut the clear and consistent testimony of Florsheim's witnesses, and Florsheim's documentary evidence, of when and how the plan to change to full time help was formulated and then implemented.

In fact, the ALJ specifically found that Brien's testimony was corroborated by the testimony of Holmes, Silverhorn and Levine. (A. 940a).

Former employees Halliday and Corrigan, however, both testified to a conversation they allegedly had with store manager Holleran. The ALJ relied on this conversation in part, including a reference by Holleran to possible termination of part-timers, in reaching his decision. We show below that neither account of the conversation is believable; they contradict each other in numerous respects. P. 57 infra. The only evidence in the record is that the store managers were unaware of the decision to eliminate part timers until it was actually implemented. (A. 605-611a; A. 714a). Moreover, no other part time employee testified ever to having heard about such a remark.

Based, then, only on his own assumption that in a company like Florsheim a general manager would not let well-connected Levine's failing to carry out instructions pass without taking positive action, the ALJ concluded that the testimony on the plan to change to full time sales people was "concocted." (A. 948a).*

The ALJ eschewed making individual credibility findings on Brien, Silverhorn, Holmes, and Levine. He also referred to no piece of evidence which supported his theory of "concoction". On the contrary, he reached his decision on the basis of his own, presumably limited, experience in the business world. In contrast, those familiar with the business would recognize how common such delays are.

In reality accusing Florsheim witnesses of a massive conspiracy to perjure themselves, the ALJ found that the termination of part time employees was, therefore, a violation of §8(a)(3). Wholly ignored in this irresponsible conclusion is the ALJ's own finding that the Florsheim witnesses corroborated

* We simply note in passing that bureaucratic delays in making or implementing decisions are hardly unusual in large organizations. Here the ALJ ties his entire view of an issue to a delay in implementation of approximately 6 months, which the ALJ asserts makes the fully corroborated testimony of four witnesses unbelievable. The ALJ, by the same token, delayed his decision in this matter for a similar period -- from March 24, 1976 when hearings closed until September 27, 1976. The point is, simply, that busy people cannot always turn to each matter at once.

one another, the documentary evidence disproving any concoction and the fact there is no shred of evidence suggesting any perjury.

The Board, without comment, affirmed the ALJ.

The Termination of Bakowski

In an unrelated personnel move, Ronald Bakowski was discharged for cause on or about August 28, 1975. There is considerable dispute over precisely when the discharge took place,* but the record is clear that Bakowski's supervisor had spoken to him about his fighting with other employees (A. 135-139a) and his use of abusive language. (A. 138a). When Bakowski provoked a fight with fellow employee Flaherty, it precipitated his termination. (A. 135-6a; A. 265-267a).

* The General Counsel contends, and the ALJ found, that Bakowski was discharged on August 30, after the union had filed its representation petition; in violation of §8(a)(3).

If this be the case, it is unexplained why the union, in an unfair labor practice charge filed September 8, only one week after the incident, alleged that the discharge occurred on August 29, not August 30. (General Counsel's Exhibit 1a, A. 798a).

The letter terminating Bakowski is dated August 28, and testimony confirms that Brower, the supervisor had decided upon the termination course on August 28 (A. 267-270a; A. 749-51a, General Counsel's Exhibit 12, A. 833a), because of continuing problems with Bakowski, which were communicated to Levine, the district manager, during the week of August 25. In addition, the termination notice is dated August 28. (General Counsel's Exhibit 13, A. 834a). All this was before the union's petition was filed.

Bakowski signed an authorization card on August 28, his last day at work before a vacation, and the day before the union filed its petition. Only fellow employees Scott and Foreman knew of this.

Bakowski himself testified, referring to his last day at work, August 28:

"Q And, had you, at that time, told Mr. Brower, the manager, that you were joining a Union?

A No.

Q And, to your knowledge, did Mr. Scott ever tell Mr. Brower that he had joined the Union? . . .

THE WITNESS: No.

Q (By Mr. Dicker) What about Mr. Foreman?

A As far as I know, no." (A. 132a)

There is no evidence in the record that either Scott or Foreman informed Florsheim that Bakowski had anything to do with a union, prior to his termination.

The record is thus totally devoid of any indication Florsheim knew about Bakowski's union connection at the time it discharged him.

The Transfer of Macko

As part of the entire change to all full time help in Pittsburgh, George Macko was transferred from one store to another, on September 19.*

* Macko transferred from the Monroeville Mall store, a suburban setting, to 200 Fifth Avenue, a "downtown" location.

Paul Holmes, Brien's administrative assistant and his personal emissary to Pittsburgh to accomplish the change-over, judged that Macko was necessary at the store to which he was transferred. (A. 495a).

It is undisputed that Macko was the number one assistant manager in Pittsburgh, underlining his value to the new store. Likewise there is no question that Macko received a pay raise from approximately \$3.16 per hour to \$3.33 because of the transfer. (A. 793a).

In addition, the uncontested evidence shows that the job to which Macko transferred was vastly more important than his previous one; Macko's new job would bring him into continuous close contact with the District Manager, thereby increasing Macko's chance for promotion. (A. 495a).

The sole reason advanced by Macko for not wanting to transfer was personal, not union-based: his father was ill and an alcoholic; his wife and he lived with his father; and the Monroeville Mall Store was close to his house (A. 498a).

Macko's own testimony demonstrates, however, that Holmes and Florsheim were extraordinarily sensitive to this problem and attempted to work out a solution balancing the company's business needs against Macko's personal desires. He testified:

"Mr. Holmes told me that he sympathized with my problems. He said he knows what it's like, in fact because his father was also an alcoholic. He said that if any emergency ever arose that I was authorized to leave the store in Pittsburgh to go home in case of an emergency, anytime one arose and that he would authorize me to go home by cab...

Q What did you respond?

A I can't remember if I responded anything. I was just, just shocked that he would say a thing like that."

(A. 498a)

In spite of this uncontroverted evidence, however, the ALJ found that the transfer violated the Act, chiefly on the basis of two factors: Macko was quite friendly with another of the Monroeville Mall salesmen, and Florsheim employed other salespeople who could -- in the ALJ's view -- have been transferred as easily.

In reaching this conclusion, the ALJ relied on the fact that Macko's former store manager, the lowest level supervisor in Florsheim's hierarchy, seemed to know that Macko was a union adherent.

Significantly, that manager had nothing to do with the transfer. Holmes, from Chicago, made the decision; and there is no proof in the record that Holmes knew of Macko's union activities. Indeed, the General Counsel never even asked Holmes what he knew about Macko's union affiliations.

Moreover, the transfer did not put Macko outside

the area of the union's organizing drive. On the contrary, his transfer put Macko into close contact with two downtown stores (the new one and a second which is just a few blocks away) -- instead of the one, relatively distant store at which he had worked previously. Thus, any union activities Macko might have wanted to ~~conduct~~ were in fact not impeded, and may even have been facilitated, by the transfer.

The Union's Organizing Drive

In the meantime, as these personnel changes were going on, the union was evidently conducting an organizing campaign. Apparently the campaign began in March, 1975, when three employees met with a union organizer.

Not until August 29, 1975, however, did Florsheim first learn of the campaign. And it was not until September 2 that Brien - Florsheim's general manager - received such information. (A. 568a; A. 602-604a; A. 695a; A. 743-4a; A. 782-3a). These facts are undisputed.

Evidently not serious about seeking voluntary recognition, on the day after the union mailed its recognition demand, August 28, it filed its representation petition with the Board.*

* This was the only demand for recognition the union ever made. At that time, the union possessed "authorization cards" from less than a majority of the employees. The next day, it submitted all the cards it had--ten, or less than a majority. Compare the reverse side of General Counsel Exhibits 4(a), 4(b), 4(c), 10, 11, 16, 17, 20, 21 and 28 (A. 819a; 821a; A. 823a; A. 830a; A. 832a; A. 840a; A. 842a; A. 848a; A. 850a; and A. 863a), showing they were received by the Board on August 28 with all other cards which are not similarly stamped.

On September 8 Brien came to Pittsburgh and met with the store managers. Called by the General Counsel as his own witness - testimony which was never challenged - Brien testified that he instructed his store managers not to question employees about union sympathies or in any manner surveil them or interfere with their free exercise of organizational rights. (A. 165-167a).

The store managers are people who work side by side with the salesmen, day to day, and are themselves engaged in selling. Apparently there were several conversations between these managers and the salesmen in which subjects related to the union came up. Despite the closeness of the relationship between managers and salesmen, and the managers' evident lack of the legal sophistication necessary for personal conversations occurring after a union petition is filed, the ALJ held that each one of these conversations violated §8(a)(1) of the Act on the bases of credibility determinations. Amazingly, every single conversation testified to was found to violate the Act. Even employers who actually direct low level management to commit unlawful acts could not have achieved such a result.

We view these conversations among fellow workers quite differently from the ALJ, and contest only three of his findings - discussed more fully below, p. 54-59 infra - because of the strictures of Universal Camera.*

* We do challenge, however, certain §8(a)(1) violations allegedly committed by Silverhorn, who is higher in the Company's hierarchy. As we show below, there is no substantial evidence to support the Board's conclusions on these matters, p. 54-56.

The Membership Applications

Underlying the union's demand for recognition and petition filed with the Board (as well as the bargaining order in this case) is its contention that it obtained valid authorization cards from a majority of the employees in an appropriate bargaining unit.

As of August 29, 1975, Florsheim employed 22 employees. But, on September 18 this number changed. Twelve part time employees were terminated - lawfully - and replaced by seven other employees.* The union obtained 17 membership applications, but 11 came from the part time employees. Thus, the union obtained only 6 applications from Florsheim's 17 full time employees.

Beyond this, the "cards" were deliberately designed to obscure or conceal the purpose for which they might be used - to designate a collective bargaining representative without benefit of an election.

In letters of 1/4 inch, the "cards" announce at the top they are "Membership Applications." In 3/8 inch

* The General Counsel alleged that only 11 of 12 part timer's terminations violated the Act. The twelfth, Scott, was terminated at about the same time, and curiously his termination is not alleged to violate the Act. However, the union did allege, at first, that Scott's termination violated the Act as part of the plan to eliminate part time help. See, General Counsel's Exhibits 1(a), A. 798a; 1(c), A. 799a; 1(e), A. 800a.

letters, the cards tell potential signers that they are dues check off authorization cards. But, furtively, the so called bargaining agent "authorization" is concealed by letters of less than 1/16 inch, deliberately placed at the bottom of a legend positioned to the side of the card, away from the area most likely to be read. (See, e.g., General Counsel's Exhibit 4a, A. 818a).

Indeed, the union organizer testified that these cards were membership applications, not authorization cards. He said in response to a leading and suggestive question from the ALJ:

"JUDGE NACHMAN: You call it a membership application. Is that strictly an authorization card?

"THE WITNESS (Best): No, it was not an authorization card. It was a membership application."

(A. 51a). (emphasis added)

Thus, not only could employees not know of the purposes to which the cards might be put, but the union's organizer (after being improperly led by the ALJ) explained that despite the secretive words the card was "not an authorization card. On the contrary, "it was a membership application."

Despite this testimony the Board held the cards were "valid authorization cards" and issued the extraordinary remedy of a bargaining order.

ARGUMENT

POINT I

FLORSHEIM'S CHANGE OF ITS SALES
FORCE TO ALL FULL TIME HELP, AND
RESULTING TERMINATION OF PART TIME
EMPLOYEES WHO COULD NOT WORK FULL
TIME, WAS PERFECTLY LAWFUL

The Board's decision on the part time issue must be set aside because there is not one shred of evidence to support it.

The fully corroborated testimony of Florsheim witnesses - as well as documentary evidence - establishes that the plan to change to all full time sales help was formulated by January, 1975 and in progress in August, 1975, under the personal supervision of general manager Brien. In August, 1975, he was actively seeking Florsheim employees from other areas who would transfer to Pittsburgh and work full time. It is undisputed that Brien had no knowledge of union organizational activity in the Pittsburgh stores until September 2, 1975.

The uncontradicted facts thus show the change, its planning and its implementation, had nothing to do with the union. The only evidence of record concerning the planning of the change is that which Florsheim submitted. And it shows a plan, formulated without regard to the union, implemented in the normal course of Florsheim's business when enough

full time transfers could be found. There is no proof that Florsheim took its action for anti union reasons.

The ALJ and Board, however, simply discarded the testimony of Florsheim's four witnesses and Florsheim's documentary evidence in order to reach the conclusion that the termination of part time employees violated §8(a)(3) of the Act.*

The sole reason offered by the ALJ for rejecting all of Florsheim's evidence on this point is his observation that:

"One would have to be credulous indeed to believe that in a company like Florsheim Shoe Stores, which operates on a national scale, the National General Manager would sit by and watch his orders flaunted by a local manager, and not take some very positive action against the latter." (A. 947a)

Having found that Florsheim's four witnesses corroborated one another and that the General Counsel had put on no evidence to contradict Florsheim's account or to prove an anti union motive, however, the ALJ seems to have recognized the ephemeral foundations for his re-

* Section 8(a)(3) makes it an unfair labor practice for an employer to discourage membership in a labor organization by discriminating in regard to terms and conditions of employment. To establish a violation of this Section of the Act, the General Counsel must prove anti-union motivation behind the employer's action. NLRB v. Brown, 380 U.S. 278 (1965)

markable ipse dixit. He went on, therefore, to conclude that all Florsheim's evidence was concocted, and then to infer from this that the change to all full time sales help was motivated by anti union considerations.*

This extraordinary line of reasoning poses squarely for this Court questions which go to the heart of judicial review of administrative agency actions. Where is the evidence of anti union motivation on which the ALJ and Board rely? What fact or facts support the "conclusion" that Florsheim evidence was concocted? What portion of the record disproves Florsheim's account that the full time sales help change was planned long before any union organizational activity, and was in progress - full time transfers were being sought - before Florsheim had any knowledge of the union? Lastly, what principle of law justifies a trier of fact's assumption about the way an organization should run being elevated to the status of fact in order to permit rejection of fully corroborated testimony, and conclude four men perjured themselves? It is one thing to discredit a witness. It is quite another thing to find without factual support that four company executives conspired to give perjured testimony and submit forged documentary evidence.

* Of course, the reason Levine was not reprimanded and Brien himself took charge of the change was Levine's unique personal situation. See p. 8-9 supra.

In Universal Camera the Supreme Court accorded to Board determinations of fact a strong presumption of correctness, to the extent they are supported by substantial evidence. However, without answers to these questions - and there are none - the Board's decision must be reversed. As the Supreme Court taught in Universal Camera:

"Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function."

340 U.S. at 490.

Time and again this Court, other Circuit Courts of Appeals, and even the Board have recognized that an employer does not violate §8(a)(3) by instituting a personnel change, after a union has filed a representation petition, where as here there is no proof the change was planned with reference to union organizational activity. e.g. NLRB v. River Togs, Inc., 382 F.2d 198 (2d Cir. 1967); NLRB v. M. H. Brown Co., 441 F.2d 839 (2d Cir. 1971); Stone & Webster Eng. Corp. v. NLRB, 536 F.2d 461 (1st Cir. 1976); NLRB v. Consol. Diesel Electric Co., 469 F.2d 1016 (4th Cir. 1972); Black Hawk Corp. v. NLRB, 431 F.2d 900 (4th Cir. 1970), cert. den. 401 U.S. 91 (1971); King Electrical Mfg. Company, 208 NLRB 916 (1974).

For example, NLRB v. M.H. Brown, supra, 441 F.2d 839 is almost directly in point and compels reversal of the Board on the part time issue. In Brown, the union first notified the

employer of its organizing drive on January 10, 1969. On January 19, 1969 a union organizer met with the employer and requested recognition, offering to show him the authorization cards it had obtained. Two days later, the employer terminated its second shift, laying off seven employees.

Despite uncontradicted testimony that the termination of the second shift was planned before the employer ever knew of the union's organizing campaign, because of declining sales - testimony which virtually duplicates Florsheim's testimony in this case - the Trial Examiner found, and the Board affirmed, that this personnel change violated §8(a)(3).

In Brown, the Trial Examiner engaged in the same suspicions and assumptions about business operation which the ALJ gave vent to here as a basis for his determination. In words echoing those of the ALJ in this case, the Trial Examiner wrote:

"Orders received were lowest in November and December of 1968 and on December 11 Brown had been told 'right after the first of the year close down our next shift.' Why did he wait until January 16? He said the layoff notice had to be given on a payday. With 1 week's pay always held back, why did it have to be a payday, and why that particular Thursday?"

179 NLRB 889, 893
(1969) (emphasis added)

After engaging in such deriding of the employer's business operations, the Trial Examiner concluded with the same reasoning the ALJ utilized here:

"Where, however, the questions mount, where the total situation presents a series of meaningful coincidences met only with superficially pat replies, logic and human experience dictate that all be rejected." Id.

This Court rejected the Board's conclusions - based on suspicion, assumptions, but no facts - in Brown, and for the same reasons should do so again in this case. When an employer's evidence of an action planned without knowledge of union activity is unrefuted, there can be no substantial evidence to support the conclusion that the terminations were unlawfully motivated:

"... where the employer asserts a business justification for the lay-offs, some basis for concluding that they were motivated at least partially by anti union considerations must be shown."

449 F.2d at 843.

The underlying premises of Brown, as well as Universal Camera's substantial evidence requirement, is that it is the Board's General Counsel's burden to prove anti union motivation behind a discharge in order to sustain a violation of §8(a)(3). e.g. Stone & Webster Eng. Corp. v. NLRB, supra, 536 F.2d 461. This burden cannot

be carried where, as in this case, an employer's evidence on business justification or planning a personnel change before hearing of a union organizing campaign is unrefuted, even where the employer may have committed independent unfair labor practices. Id.

The First Circuit Court of Appeals made precisely this point in Stone & Webster, where terminations followed the employer's becoming aware of a union organizing drive, but where uncontradicted testimony showed the terminations resulted from business developments analyzed before the organizing campaign:

"... Stone & Webster...did present a substantial amount of basically unrefuted evidence as to the business reasons which they claimed motivated the desire to terminate these employees...the Board neither directly challenged the accuracy of the evidence concerning economic necessity nor affirmatively showed that it was a cloak for actual discriminatory motivation..."

536 F.2d at 466.

In words directly applicable to the ALJ's decision in this case, the Court continued:

"Absent proof of bad faith or discriminatory motivation, it certainly is not our role to second guess the business judgments of private companies. The Act was not intended to guarantee that business decisions be sound only that they not be the product of anti union motivation..."

Id. at 467.

Thus, from Florsheim's unrefuted testimony and the General Counsel's failure to introduce any evidence on the subject, it is plain that the General Counsel did not carry his burden and that there is no substantial evidence supporting the Board's determination that Florsheim's termination of part time employees, incidental to a plan formulated several months before any union organizing activity and which was implemented in the normal course of Florsheim's business, violated the Act. There is no evidence in the record proving an unlawful purpose behind the plan.

Indeed, only recently did the Board take precisely this position in a very similar case - one which neither the ALJ nor the Board found necessary to distinguish although cited by us. King Electrical Mfg. Company, 208 NLRB 916 (1974)*

There, as here, the company had planned lay-offs prior to the filing of a representation petition. There, as here, the actual implementation of the decision did not take place until after the petition had been filed. The ALJ held, and was affirmed by the Board:

* Of course, as this Court has taught, one of the functions of a court on review is to insure consistency in administrative determinations. NLRB v. General Stencils, Inc., 438 F.2d 894, 904 (2d Cir. 1970), further opinion 472 F.2d 170 (2d Cir. 1972).

"Respondent has established by credible evidence, and I have found, that the March 23 shutdown date was set by March 16 when Wilson wrote the new production schedule.... In short, for the reasons already stated, I find that Respondent did not make a spontaneous decision to shut the plant when the demand for recognition was made on the afternoon of March 23. The decision to close on March 23 preceded the demand for recognition. Wilson's testimony that he was totally unaware of the union activity until the time of the demand on March 23 is not contested by the General Counsel, who in his brief refers to the secret signing of the cards as the obvious reason why Wilson was unaware of the union activities until the demand. As I have found that Wilson did not have knowledge of the union activity until the demand of March 23, it follows that there can be no causal connection between the decision to close the plant on March 23 (which was made prior to the demand) and that demand."

208 NLRB at 923
(emphasis added)

Thus, as a pure legal matter, the General Counsel's failure to refute Florsheim's evidence and his concomitant failure to put on any evidence of his own to show an anti union motivation precludes the finding of a §8(a)(3) violation in this case. But even beyond this failure to meet technical requirements, beyond the General Counsel's failure to meet his burden, is the affirmative uncontradicted record evidence which shows a complete lack of anti union motivation in the termination of the part time employees.

Florsheim transferred to Pittsburgh five employees from areas unionized by the same international union to which the union here belongs. No employer operating out of anti union motivation would ever do this.

Florsheim terminated all part time employees, but leading union adherents - Osselburn, Koritsky, Schneider - were not affected at all. And Macko, another union adherent, was transferred to a new store where he could do more campaigning for the union than in his previous position.*

Further, the change from part time employees to full time employees caused a dramatic increase in sales, reversing the severe decline then occurring, and was consistent with identical changes Florsheim had made in other major cities in the country.

Thus, what the Board would have this Court believe is that an employer who takes no action against supposedly known union adherents, who in fact transfers employees from unionized stores into so-far unorganized stores, is acting out of anti union motivation. Neither reason, nor logic, nor experience provide support for this.

* The only possible evidence contrary to these unrefuted facts is that Holleran - one of eight company officials alleged to have violated the Act - told two of the 22 employees that part timers might be terminated. Arrayed against the rest of the record this comment - even assuming the General Counsel's witnesses told the truth which as we show below pp 57-59, they did not - it is not substantial evidence on the record. Indeed, in this Circuit Judge Friendly has warned us to beware of the "fallacy of the lonely fact." NLRB v. General Stencils, Inc., supra 472 F.2d at 173.

Beyond this, it is unrefuted that Holleran was not involved in the decision making process on the change to all full time help; and the only evidence in the record shows that Holleran was not told about the plan until it was actually implemented. Any statement made by him about part timers, therefore, was obviously speculation.

Based on the unrefuted testimony of Florsheim's witnesses, and the clear and consistent case law, including the Board's own decision, the Board's finding that Florsheim violated §8(a)(3) by terminating part time employees who could not work full time, as part of its change to all full time employees, must be reversed.

POINT II

ASSUMING THE TERMINATION OF
PART TIME EMPLOYEES WAS A
VIOLATION OF THE ACT, THE
BOARD'S REINSTATEMENT REMEDY
IS NONETHELESS IMPROPER

Throughout these proceedings Florsheim has openly taken, and again takes, the position that any of its former part time employees who can work full time will be offered jobs as available.

Seeking to remedy the termination of the part timers - which we have shown above did not violate the Act - the Board has ordered Florsheim to "offer immediate, full and unconstitutional reinstatement... to the job [the part timers] held prior to" Florsheim's change to all full time help.

Even should this Court fail to reverse the Board's conclusion as to part timers, the remedy would still be improper. e.g. Trico Products Corp v. NLRB, 489 F.2d 347 (2d Cir. 1973); NLRB v. Savoy Laundry Inc., 327 F.2d 370 (2d Cir. 1964).

For example, the order will require Florsheim to terminate or lay-off some of its current full time employees to make room for part time positions. The order calls for immediate reinstatement; not reinstatement as positions became available.

In addition to the dislocation of present employees which the Board's order would work is the profound change in Florsheim's Pittsburgh operation which the order would accomplish. It is undisputed that for over a year and a half the store's operation has been strictly full time, with a resulting substantial increase in sales.

In analogous cases, this Court has refused to enforce the Board's reinstatement order; and it should do so again here, if it finds that Florsheim violated the Act with regard to the part time employees.

In NLRB v. Savoy Laundry, Inc., supra, 327 F.2d at 370, the employer closed down its wholesale shirt laundering business, discharging 22 employees in violation of the Act. Writing for a unanimous Court, Judge Kaufman held that a reinstatement order could not be enforced:

"Whatever the reasons, Savoy has not engaged in this phase of the laundry business for almost three years; since its patronage and good will have undoubtedly been lost in the interim, we feel that it would be unduly harsh to require the resumption of the division now."

327 F.2d at 372.

Similarly, the resumption of part time salesmen here would have serious impact on Florsheim. The close personal relationships full time salespeople - who would have to be terminated as a result of the order - have built with customers would be lost. The "look" of the

stores would change, leading to possible loss of clientele developed over the last 18 months, and these combined conditions could prove unfairly burdensome to Florsheim. Under Savoy Laundry, then, the remedy is improper.

All of this must also be considered in light of Florsheim's unrefuted evidence concerning the poor performance of the Pittsburgh stores due to a predominantly part time sales force. Even if anti union motivation could be found in the timing of the elimination of part time help - which the record shows it cannot - it is still indisputable that based on its previous experience in eliminating part time help in Los Angeles, New York, Philadelphia and Atlanta, Florsheim would eventually have eliminated part time help in Pittsburgh. Thus, the Board's order seeks to change an inevitable situation.

The effect of the Board's order is to direct the Company to return to a method of doing business which it has found to be unsuccessful. Neither the Board nor this Court stand ready to guarantee that the directed return to part-time employees would not cause a decline in sales. The only evidence is that it will. Who then is to explain to the stockholders about this loss of business? Who will explain to the employees who eventually may lose their jobs because of a sales decline? While acts violative of the

law must be remedied, the remedy cannot be one which makes the Board the arbiter of how a company does business. This certainly was not contemplated by the Act. The concept must be rejected.

In Trico Products Corp. v. NLRB, supra, 489 F.2d at 347, this Court refused to enforce a reinstatement order for these reasons and precisely because the order sought to undo a similarly inevitable business decision. Trico Products requires the same result here.

Thus, the Board's order, as drafted, should not be enforced. If any order is appropriate here - and none is because Florsheim did not violate the Act in this regard - it could only be one which places the former part timers on a preferential hiring list for hiring as positions become available.

POINT III

THE BOARD'S BARGAINING ORDER MUST BE SET ASIDE

The Board has ordered Florsheim to bargain with the union, relying on NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). There is no basis for this order, and it must be set aside.

a) The Board's order frustrates majority rule.

In Gissel, the Supreme Court said the Board might direct an employer to bargain with a union when no Board election had been held, but only when the union could prove majority status among employees in an appropriate bargaining unit on the basis of valid authorization cards. 395 U.S. at 612-14.

This expresssion of majority rule is more than an announcement of the fundamental principle of American democracy; it is an explicit recognition of the requirements of §9(a) of the Act, which specifically provides that a bargaining representative must be chosen "by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. §159(a).

Here, the Board would impose a union on employees who have not had the opportunity to express their "free choice" Gissel, supra, 395 U.S. at 614, through an elec-

tion, even though the authorization cards purportedly showing a union majority were obtained from lawfully terminated employees. Overlooked or ignored by the Board is the fact that Florsheim, lawfully, employs no part time salesmen in Pittsburgh and that the union has obtained cards from only 6 of the 17 full time employees.

What the Board's order would do, if enforced, is to give voice to the sentiments of non-employees while not even according the seven full time transfers - who came to Pittsburgh on September 18, 1975 and have worked there ever since - a say in the selection of their bargaining representative.

The Board's order, which thus frustrates the chance for majority rule and is contrary to both precedent and reason, must therefore be set aside. Saxon Paint Stores, Inc., 160 NLRB 1755 (1966); see, also Choc-ola Bottlers v. NLRB, 478 F.2d 461 (7th Cir. 1973); Harper & Row v. NLRB, 476 F.2d 430 (8th Cir. 1973).*

In Saxon Paint Stores, supra, 160 NLRB 1757, the Board decided exactly this issue. The trial examiner had found that certain discharges which took place during an organizing drive violated §8(a)(3), and had also found that the employer

* For all of the reasons set forth, the Board's conclusion that Florsheim violated §8(a)(5) must also be set aside.

violated §8(a)(5), on the basis of authorization cards obtained from the discharged employees. The Board, however, held that the discharges were lawful and that authorization cards obtained from the discharged employees could not be considered in determining the union's majority:

"Inasmuch as the Trial Examiner's finding of a §8(a)(5) violation is based upon a demonstration of union majority which presupposes the inclusion of the union designations signed by the discharges herein, we shall also dismiss the §8(a)(5) allegations of the complaint."

160 NLRB at 1759.

Saxon Paint Stores, the Board's own interpretation of the Act, requires that the bargaining order and the finding of a §8(a)(5) violation here be set aside.

So too does Choc-ola Bottlers v. NLRB, supra, 478 F.2d 461 where the Seventh Circuit refused to enforce a Board bargaining order, issued after an election, which was based on the Board's including the vote of a lawfully discharged employee in the tally of the union's majority. There, the discharged employee's vote was a tiebreaker, and he had been discharged only three minutes before the election.

Recognizing, however, that to count the vote of a discharged person as a basis for imposing a union on employees would be to undermine the right to majority rule by employees, the Court said:

"His employment relationship had not been terminated by reason of a current labor dispute or an unfair labor practice. He was no longer sufficiently concerned with the terms and conditions of employment in the unit to warrant his participation in the representation election."*

478 F.2d at 464.

Under the teaching of the Board and the Courts, then, the authorization cards obtained from the former part-time employees may not be counted towards a union majority. These employees were lawfully terminated. The union thus did not obtain authorization cards from a majority of the unit, and the bargaining order must be set aside. Gissel, supra.**

The only basis for a bargaining order at all discussed by the ALJ is the termination of the part-time employees. Because this termination was lawful, the bargain-

* The Eighth Circuit has also recently held that where a union had obtained authorization cards from a majority of the unit, but subsequently loses majority support for reasons other than an employer's unfair labor practices, a bargaining order may not be enforced. Harper & Row v. NLRB, supra, 476 F.2d 430.

** The union demanded recognition, once and only once, on August 28. The next day it submitted 10 authorization cards -- all it then possessed -- to the Board in support of its representation petition. At that time, there were 22 employees, so the union did not have a majority. Because the union did not have majority support when it made its only bargaining demand, no bargaining order may issue. See, Wilson Wholesale Meat Co., 209 NLRB 222 (1974), aff'd 516 F.2d 1244 (D.C. Cir. 1975).

ing order must be set aside. The Board advances no other reason for its order, and thus on its own reasoning -- without the part time terminations being unlawful -- a bargaining order is unwarranted.

- b) The membership applications are not valid authorization cards.

Authorization cards are only valid as designations of collective bargaining representatives when their purpose as such designations is adequately communicated to the signer of the card. Toltec Metals, Inc., 201 NLRB 952, 955 (1972), enf'd, 490 F.2d 1122 (3d Cir. 1974). The central inquiry is whether the cards clearly manifest an intent to designate the union as a collective bargaining agent. Levi Strauss & Co., 172 NLRB 732, enf'd, 441 F.2d 1027 (D.C. Cir. 1970).

Because the cards used in this case were deliberately designed to conceal their purpose, they are not valid within the meaning of Gissel. Since they are not, no bargaining order may issue, even if this Court should conclude that Florsheim violated §8(a)(3) of the Act by terminating part time employees.

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. §157. (emphasis added). That right would be destroyed by holding the authorization

cards here were valid. No "choosing" can possibly have taken place where employees did not know, and could not have known, the implications of their signing the cards.

The union organizer who testified as to the nature and meaning of the cards - the only such witness - clearly testified that they were "membership applications" and "not an authorization card."

The size of the "authorization" type used, contrasted to the legend "Membership Application", supports the organizer's testimony and obviously shows the cards did not inform signers that they would be used to designate a bargaining representative.

It was precisely to remedy the misrepresentation and overreaching, accomplished by type size, that Congress in another area passed the Consumer Credit Protection Act. 15 U.S.C. §1601 et seq. That Act requires the clear and conspicuous disclosure of credit terms.

The Federal Reserve Board has defined clear and conspicuous to require that "finance charges" and "annual percentage rates" be printed "more conspicuously than other terminology" on the form. The Reserve Board requires that such figures be printed in "not less than the equivalent of .075 inch type." 12 CFR §226.6.

The purported authorization cards, here, would clearly be deficient if they dealt with consumer credit. They should similarly be invalid as "designations" of a collective bargaining agent, given the significance of the §7 rights at stake. A union cannot be allowed to accomplish by trickery that which it might not have gained in an open and free election, nor that which would be forbidden by statute in any other, analagous situation.

Disclosure is the key, both to the consumer and to the prospective union member. Disclosure has not happened here. Without such disclosure, the imposition of a bargaining representative where there has been no election would be arbitrary and capricious.

Indeed, it is inconceivable that cards of this nature, characterized by the union's own spokesmen as "membership applications" and not authorization cards could be found by the Board to be valid "authorization cards".

The cards are invalid for yet another reason. The General Counsel bears the burden of demonstrating there is majority support based on valid authorization cards. e.g. The Contract Knitter, Inc., 220 NLRB #30 (1975). When an employee has not properly been informed of the purpose of a card, it is not valid unless the employee has read the card. Trend Mills, Inc., 154 NLRB 143 (1965); Fort Smith Outer-

wear, Inc. v. NLRB, 499 F.2d 223, 225 (8th Cir. 1974). In this case the General Counsel did not demonstrate that a majority of employees read the cards.

Three signers testified they had not read the legend containing the so-called authorization of Local 1407 as their collective bargaining representative. (Ball, A. 201a; Messinger, [who had another employee sign his card after having some information read over the phone]. A. 363a; Koritsky, A. 419a). In addition, another signer testified that he subsequently withdrew his application, thus invalidating his "card." (O'Neill, A. 332a).

Cappello testified that he "probably read" the whole card (A. 87a). Given the fact that this witness could not recall on what date he signed the "card" (A. 87a) or what letters from the National Labor Relations Board had said (A. 90a), his recollection cannot be credited. Indeed, the response that "I probably read the whole card" was to a question asking specifically about the so-called authorization legend (A. 86-7a). This lack of direct response, combined to the witness' other deficiencies of recollection establish there is no credible evidence he did read the legend.

Sarver testified on direct examination that he had "skimmed" the card before signing (A. 470a).

On cross examination, Sarver proved himself to be a

totally untrustworthy witness. First, he testified that the signature on the "card" was not his (A. 473a). Subsequently, he changed his story and said the signature was his (A. 476a). Sarver was also wholly unable to explain his discrepancy in dates on his card -- one reads August 6 while the other reads August 8 (A. 472-3a). Given this witness' lack of credibility, there is no evidence that he read the "card" before signing it.

The testimony of these alleged discriminatees, and all others, cannot be credited for another reason. In violation of this Court's rule announced in NLRB v. Stark, 525 F.2d 422 (2d Cir. 1975), cert. den. 424 U.S. 967 (1976) and despite the Company's motion, (A. 40a), the ALJ ruled that alleged discriminatees need not be sequestered. The alleged discriminatees were in the hearing room through the first two days of hearings and heard all of the testimony concerning the cards and their solicitation. The very evil at which Stark was aimed - the suggestion of the appropriate answer to a person in the hearing room who is later to testify about the very same matter - thus infects this case, requiring that the bargaining order be set aside.

It simply could not have escaped notice that the ALJ and company counsel had a long conversation about the membership applications - during which the company's breadth of cross examination was prejudicially restricted (A. 68a) - and that company counsel asked the very first alleged discriminatee, shortly thereafter, whether he had in fact read the "authori-

zation" legend, pointing out that it was in small print. (A. 85a).

In the absence of any other untainted testimony that the alleged discriminatees actually read the infinitesimal print of the "authorization", their response that they did - after not being sequestered - cannot discharge the General Counsel's burden to prove majority support. The Contract Knitter, supra. The bargaining order must be set aside, for this additional reason.

The ALJ made no credibility findings on this testimony.* He simply accepted it, holding the cards valid.

From the record it is clear that the cards of at least six employees out of 17 cannot be counted. Assuming the unit consisted of 22 employees -- that is, that this Court does not reverse the Board on the part-time issue, and that the cards are not invalid on their face, and that this Court will credit the testimony of unsequestered witnesses, the union still did not possess valid authorization cards from a majority of the unit, and no bargaining order may issue.

* In related Freedom of Information Act litigation, it has been held that Florsheim had a right to inspect the authorization cards (and thus prepare a defense) when requested -- which was prior to the hearing, Florsheim v. NLRB, 91 LRRM 2656 (W.D. Pa. 1976), appeal pending 3d Cir. No. 76-2160. The NLRB failed and refused to allow Florsheim to inspect these extraordinary cards prior to the hearing.

POINT IV

THE BOARD'S CONCLUSIONS ON CERTAIN
ALLEGED UNFAIR LABOR PRACTICES ARE
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE
ON THE RECORD AS A WHOLE

In this part of our argument, we demonstrate that there is no substantial evidence on the record to support several Board findings of unfair labor practices. They must, therefore, be reversed.

The Discharge of Bakowski

Despite the fact that it is unrefuted that Florsheim had no knowledge of any union activities by Bakowski, the Board held that this discharge violated §8(a)(3). Knowledge of an employee's union activity is, however, crucial to a finding of a §8(a)(3) violation. See, e.g. NLRB v. L. I. Airport Limousine Svc, 468 F.2d 292 (2d Cir. 1972); Winn-Dixie Stores v. NLRB, 448 F.2d 8, 13 (4th Cir. 1971); Bayliner Marine Corp., 215 NLRB 12 (1974). As the Board itself stated in Bayliner:

"because company knowledge of union activity is a fundamental prerequisite in the establishment of that [discriminatory] motivation it is also the General Counsel's burden to prove by substantial evidence the existence of such knowledge. Suspicion surrounding a discharge will not replace the need for such proof."

215 NLRB at 12.

As we set forth above, pp. 19-20 supra, Bakowski himself told the ALJ that the company had no knowledge of his union activity. At most, all that supports the ALJ and Board finding is suspicion; under the Board's own standard the finding of a violation is therefore not supported by substantial evidence; it must be reversed.

The Transfer of Macko

The Board's finding that the transfer of Macko violated §8(a)(3) is similarly defective. Holmes was the individual responsible for the transfer; he was not stationed in Pittsburgh and there is no evidence he knew of Macko's union activity.

In addition, all the circumstances surrounding the transfer are inconsistent with even any inference of an anti-union motivation. Why, if Florsheim was out to get Macko because he was a union man, would Florsheim give him a higher paying, more responsible job? Why would Florsheim, through Holmes, specifically seek to accommodate Macko's worries about his father, and the ability to get to him in event of difficulty, if the transfer was motivated against Macko's exercise of his statutory rights? The answer is that Florsheim -- Holmes -- had no anti union

motivation and in fact knew nothing of Macko's union activity. The Board's finding must therefore be reversed.*

Silverhorn's Conversations

The ALJ found that Silverhorn's conversations with employees Schneider and O'Neil, on September 9, violated §8(a)(1) of the Act.** The Board affirmed, with no comment.

The ALJ ventured no explanation of why these conversations were coercive and therefore violated the Act; he simply found violations. The record, however, does not support these conclusions.

Even fully crediting Schneider's testimony, the employee stated that he volunteered he was in favor of the union. Schneider testified to no threats by Silverhorn, nor even to being made to feel uncomfortable. Silverhorn, according to Schneider, did not ask about other employees.***

* The ALJ held Florsheim to an incorrect standard of proof, requiring that the company explain why other employees could not have been transferred instead of Macko. Apart from the ALJ's evident inclination to run Florsheim's business, it is the General Counsel's burden to prove unlawful motivation, not Florsheim's burden to disprove every inference inconsistent with a lawful discharge. See, NLRB v. River Togs, Inc., supra, 382 F.2d 198.

** Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of rights guaranteed in section 7." 29 U.S.C. §158(a)(1).

*** Silverhorn testified that Schneider, not he, initiated the talk about the union (A. 657a).

Silverhorn's conversation, as reported by Schneider, was truthful comments about the strike in New York along with the personal reassurance that Schneider should call him if he had any problems.

Significantly, Schneider felt he could respond truthfully to Silverhorn. He testified:*

"he asked me what I thought about the union. I said I was for it and I said it was mostly for more money."

(A. 288a).

Schneider's lack of fear of reprisal, as evidenced by his frank, unhesitating, truthful reply to Silverhorn, establishes that this conversation did not violate the Act. NLRB v. Monroe Tube Co., 545 F.2d 1320 (2d Cir. 1975); J. J. Newberry Co. v. NLRB, 442 F.2d 897 (2d Cir. 1971); Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964). Indeed, the conversation virtually duplicates that in Newberry, supra, in both content and circumstances -- a conversation this Court held to be lawful:

"....warehouse manager Romine called employee Doris Larson to his office. The conversation commenced with Romine's observation that he had heard that Mrs. Larson was for the Union. Mrs. Larson replied forthrightly that she was for the

* In any event, Schneider's testimony cannot be the basis of an unfair labor practice finding. Schneider was not an alleged discriminatee yet he sat in the hearing room throughout, despite Florsheim's request for sequestration of witnesses and the ALJ's own order. The Board must therefore be reversed for this additional reason. C.f. Stark, supra, 525 F.2d at 426-430.

Union if it would bring better wages and working conditions..."*

442 F.2d at 900.

Likewise, Silverhorn's conversation with O'Neil did not violate the Act. O'Neil testified that Silverhorn asked him his feelings on the union, and that he replied:

"I had reconsidered my vote for the union and I decided to withdraw my application ... that I wasn't interested in the union and that I felt at present it wouldn't benefit me." (A. 331a).

There was nothing else in the conversation; no threats, no inquiries about other employees; no statements against the union.

Only recently this Court held that virtually identical conversations did not violate the Act. NLRB v. Monroe Tube Co. 545 F.2d at 1328. The difference in conversations is that in Monroe Tube the inquiries were more targeted: Did the employee actually sign a union card? Nonetheless, these conversations were not violations -- and neither is the one in this case -- because the employee, replying truthfully and without hesitation, was in no fear. Silverhorn's conversation with O'Neil therefore did not violate the Act. See, also Bourne v. [redacted], supra.

* In reaching his conclusion on this and other alleged violations, the ALJ reinforced his analysis with findings of other unfair labor practices. The law, of course, is otherwise. An interrogation not coercive itself "does not become coercive because the employer is guilty of other unfair labor practices." NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2d Cir. 1969)

Holleran's Conversation With
Halliday and Corrigan

We challenge, finally, one more finding of the Board because the evidence in support of it is so obviously incredible, so untrustworthy, that the General Counsel quite clearly has not carried his burden of proof.

Halliday and Corrigan each testified to a conversation with Store Manager Holleran. Their accounts conflict on so many small details -- indicia of truthfulness -- that neither can be credited. In short, it appears that their testimony was nothing other than a fabrication.

Halliday's account of the surrounding circumstances was: The conversation took place about September 8 (A. 346a;) No customers were in the store during the entire conversation (A. 358a). The conversation was loud (A. 357a).

Testifying in complete contradiction of Halliday, Corrigan said the conversation took place around August 28 -- not September 8 (A. 394a, A. 395a, A. 396a). A couple of customers did come into the store (A. 399). The conversation was not very loud (A. 398).

On the central story they would tell, however, both witnesses basically agreed: Holleran had said the union was nothing but a part of the Mafia. (Halliday, A. 344a, A. 354a);

(Corrigan, A. 382a, A. 399a, A. 400a). They also both testified that Holleran had said all the part timers might be laid off. (Halliday, A. 344a); (Corrigan, A. 384a).

But, there their agreement ended. Halliday testified that Holleran had said Brien wanted to negotiate separately with the employees (A. 344a). He even attempted, without being asked, to give -- twice, in precisely the same words (A. 353a) -- Corrigan's response to this comment by Holleran (A. 353a). Corrigan, remarkably, never ever mentioned this supposed statement by Holleran or the comment Halliday tried to supply for him.

Further demonstrating the unbelievability of this account, Corrigan had given a statement to the Board on September 26 -- less than a month after the alleged incident. Despite his testimony that Holleran's reference to the Mafia was easy to remember because he was Italian (A. 399a), Corrigan did not include in this September 26 statement any reference -- at all -- to this supposed conversation (A. 400a). It is simply unbelievable that a witness should recall a comment, nine months after the supposed fact, which he did not remember just three weeks after the incident.

Beyond all of this, not one other witness testified to hearing any talk by Florsheim supervisors that part time employees might be laid off. It is incredible that Halliday

or Corrigan would not have mentioned Holleran's comment to other part-timers, if it was really said.

Because there is no other testimony -- by any former part-time employee -- about such a statement, the conclusion is inescapable that the statement was not made.

This conclusion is further buttressed by Holmes unrefuted testimony that store managers, Holleran included, were not told of the change to all full time help until just before September 18, long after Holleran supposedly made his comment (A. 715a). Thus, the discrepancies in Halliday's and Corrigan's stories and the lack of independent verification discloses the conversation never happened, at least as testified to.

Based on all this, there is no substantial evidence on the record to sustain the Board finding; it must be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the petition for review be granted and that the Board's Decision and Order of January 17, 1977 be set aside in those respects outlined above.

Respectfully submitted,

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